Office Supreme Court, U.S.
FILED
AUG 24 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. [redacted] 46

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD, d/b/a PICKARD ENGINEERING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE PETITIONERS.

CHARLES C. TRABUE, JR.,
Nashville 3, Tennessee,
Attorney for Petitioners.

Of Counsel:
TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life & Casualty Tower,
Nashville 3, Tennessee,
HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,
HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Federal rules involved	2
Question presented	3
Statement	6
Summary of argument	14
Argument	16
A. Rule 13 (a) does not govern	16
B. Authorities cited by the court below	19
C. Allocation of payments	22
Conclusion	28

Cases Cited.

Arvey Corporation v. Peterson, 178 F. Supp. 132 (E. D. Pa. 1959)	23
Bain-Nicodemus, Inc., v. Bethay, 40 Tenn. App. 487, 292 S. W. 2d 232 (1953)	11, 12, 24
Desjardins v. Desjardins, 193 F. Supp. 210, 215 (E. D. Ky. 1961)	26
Gallahar v. George A. Rheman Co., 50 F. Supp. 655 (S. D. Ga. 1943)	21
Hancock Oil Co. v. Universal Oil Products Company, 115 F. 2d 45 (9th Cir., 1940)	21
Korbly v. Springfield Institution for Savings, 245 U. S. 330, 38 S. Ct. 88, 62 L. Ed. 326 (1917)	24

Moore v. N. Y. Cotton Exchange, 270 U. S. 593, 70 L. Ed. 750, 46 S. Ct. 367 (1926) 22

National Bank of New York City v. Mechanics' National Bank, 94 U. S. 437, 24 L. Ed. 126 (1877) 24

Pennsylvania R. Co. v. Musante-Phillips, Inc., 42 F. Supp. 340 (N. D. Cal. 1941) 21

Standard Surety & Casualty Co. v. U. S., for Use and Benefit of Campbell, 154 F. 2d 335 (10th Cir. 1946) 24

The United States v. Kirkpatrick et al., 9 Wheat. U. S. 720, 6 L. Ed. 199 (1824) 23, 24

United Artists Corporation v. Masterpiece Productions, Inc., et al., 221 F. 2d 213 (2d Cir. 1955) 21

United States v. Eastport Steamship Corporation, 255 F. 2d 795 (2d Cir. 1958) 18, 19, 20, 21

U. S. for Use of Carroll v. Beck, 151 F. 2d 964 (6 Cir., 1945) 11, 25

Statutes and Rules Cited.

Federal Rules of Civil Procedure:

Rule 1 2

Rule 8 (a) 15

Rule 8 (e) 3, 27

Rule 13 (a) 2, 5, 11, 12, 14, 16, 18, 19, 20

Rule 13 (b) 2

28 U. S. C., § 1254 (1) 2

40 U. S. C., § 270 (b) 3, 6, 10

Textbooks Cited.

A. L. R. 940, Annotation, 164 24

40 Am. Jur., Payment, § 129 ..... 12, 24

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 574.

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD, d b a PICKARD ENGINEERING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court for the Middle District of Tennessee is unreported, but appears in the record (R. 85-100). The opinion of the Court of Appeals for the Sixth Circuit (R. 170-182) is reported at 293 F. 2d 403.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 3, 1961 (R. 169), and petition for rehearing was denied on August 30, 1961 (R. 182). The petition for a writ of certiorari was filed on November 27, 1961 and was granted on January 22, 1962, 7 L. Ed. 2d 437. The jurisdiction of this Court rests upon 28 U. S. C., § 1254 (1).

FEDERAL RULES INVOLVED.

Involved here is Rule 13 (a) of the Federal Rules of Civil Procedure which provides as follows:

> "(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Rule 13 (b) provides as follows:

> "(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. Rules Civil Procedure, Rule 13.

Also involved is Rule 1 of the Federal Rules of Civil Procedure which provides as follows:

> "**Scope of Rules.** These rules shall govern the procedure in the United States district courts and all

suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. **They shall be construed to secure the just, speedy and inexpensive determination of every action.**" Fed. Rules Civil Procedure, Rule 1.

Further involved is Rule 8 (c) which provides as follows:

"**Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . payment . . . and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, **the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.**" Fed. Rules Civil Procedure, Rule 8 (c).

QUESTION PRESENTED.

The sole question presented by this petition is one of the proper meaning and interpretation of Rule 13 (a) of the Federal Rules of Civil Procedure promulgated by this Court.

The facts of the case are undisputed. The petitioners, Southern Construction Company, Inc., and Continental Casualty Company, were sued by the original plaintiff, Pickard, in one action in the United States District Court for the Middle District of Georgia on four separate contracts under the Miller Act (40 U. S. C. 270 (b)). The suit alleged breach of one contract by Southern Construction Company at Fort Campbell, Tennessee, and three contracts at Fort Benning, Georgia, and sought one recovery for all claims of the plaintiff on all of the contracts. The defendants filed an answer and counterclaim embracing all of their payments and counterclaims on all four contracts.

Thereafter **the plaintiff**, Pickard, **filed a separate suit**, the present action, in the United States District Court for the Middle District of Tennessee, **suing on the Tennessee contract only**. The plaintiff did not formally delete the Tennessee contract from the Georgia case until a later time, but the plaintiff filed it separate suit in Tennessee for "jurisdictional" reasons under the Miller Act. After unsuccessfully seeking dismissal of this separate suit because of the pendency of the Georgia proceedings, the defendants filed an answer and counterclaim, setting up certain payments which they claimed to have been made on account of the plaintiff under the Tennessee contract.

One payment which had been made by the defendant Southern Construction Company on behalf of Pickard pertained almost entirely to the Tennessee contract, but it did involve also, to some extent, the Georgia contract, and was, at least to a limited extent, incidental to the Georgia contract as well as to the Tennessee contract. It involved the settlement of a **wholly disputed account** in connection with the Georgia case and of **an entirely undisputed account in the Tennessee case**. At the time of the first suit, this payment had not been allocated by Southern, the payor, nor by Pickard, the beneficiary of the payment, nor by Atlas Supply Company, the recipient of the payment, to either of the jobs. It was immaterial to any party that the item be allocated to one job or the other, until Pickard separated his suits and sued separately on the Tennessee contract.

When this occurred, **Southern undertook to claim credit for the payment on the Tennessee contract in the Tennessee case**. The Georgia case was tried first, and **neither party credited or claimed the payment in that trial**. The

---

* Unless otherwise noted, emphasis has been supplied by the writer.

District Court, in the present case, held that credit should be allowed in Tennessee for the payment, since the payment arose almost entirely out of the Tennessee contract, pertained if at all, only slightly to the Georgia contract, and had not been litigated in the Georgia case.

The Court of Appeals for the Sixth Circuit reversed this holding, and held that the item in question should have been claimed by Southern in the Georgia case, and **could not** be claimed in the Tennessee case, although the Court of Appeals found the facts to be as above stated, and found that the payment had been made to satisfy an undisputed account in connection with the Tennessee contract. The Court of Appeals practically conceded that its decision worked an "inequitable hardship" upon Southern, and that it was based on "a technical question of procedure," but the Court held that this item was a "compulsory counterclaim" in the Georgia case under Rule 13 (a), and that since the Georgia suit was filed first, Southern had to plead the payment there.

The Court entirely overlooked the fact that **the defendant Southern was later faced with a separate suit embracing only the Tennessee contract.** It also disregarded the power of a court to allocate previously unallocated payments upon basic principles of equity and justice.

The primary question presented is, therefore, whether or not under Rule 13 (a) a defendant who is sued on **two separate contracts in two separate courts**, with **both actions pending at the same time**, may plead his payments and credits on the two contracts according to the factual basis underlying the payments or whether on a "technical question of procedure" he is compelled to claim credit for his payments in the first suit in which he has to plead, regardless of the factual basis underlying his payments.

STATEMENT.

These suits arose under the provisions of the Miller Act, 40 U. S. C. 270 (b). **The facts are entirely undisputed, as the case now comes before this Court, and were found in detail by the United States District Court in its decision of the case. The findings of fact of the District Judge were not disturbed by the Court of Appeals for the Sixth Circuit,** and the opinion of that court restates the facts in language almost identical to that contained in the findings and conclusions of the District Judge.

Southern Construction Company was the prime contractor on a project for the rehabilitation of certain barracks at Fort Campbell, Tennessee. It was bonded by Continental Casualty Company. On May 5, 1955, Pickard entered into a subcontract with Southern to do the plumbing and heating required in the specifications of the prime contract for the sum of $50,000 (R. 103, 170).

Under the terms of this agreement Pickard was to furnish all labor and materials and was to do the plumbing and heating in accordance with the plans and specifications of the contract. He was required to furnish to Southern a performance bond guaranteeing faithful performance by him and payment for his labor and materials. Upon breach of the contract by Pickard, Article XIII of the contract authorized Southern to complete the work at Pickard's expense and to terminate Pickard's employment, take possession of the premises and hold Pickard liable for any costs in excess of the contract price (Pl. Ex. 2; R. 71-72, 103).

Work began on the subcontract by Pickard in May or June, 1955, and continued until December 16, 1955, at which time Pickard left the job without notice (R. 103, 171-172).

Pickard was unable to furnish the required performance bond on the project and remained unbonded throughout the course of the work (R. 103, 171).

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with Southern Construction Company for rehabilitation of barracks at Fort Benning, Georgia. **Pickard's primary supplier for both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company of Atlanta, Georgia** (R. 103-104, 171).

On October 7, 1955, there was executed a supplemental agreement between Pickard and Southern (Deft. Ex. 1; R. 73-78) which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell; that Pickard had been unable to obtain performance bonds on these various jobs; that Southern had been holding certain funds due him in lieu of said bonds; and that Pickard was in need of funds with which to complete the jobs and to pay other bills. Under this agreement Southern waived the provision requiring performance bonds, and Pickard waived all claims against Southern as a result of the withholding of any funds due Pickard in lieu of bond. Pickard further authorized Southern to withhold all other and further payments on work completed or to be completed during the course of the jobs until the completion of each job by Pickard and the final acceptance and payments thereof by the Army to Southern, excepting payments therein agreed to be made, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or material men, or to Pickard, as Southern is paid on requisitions which include labor and/or materials furnished by such subcontractors and/or material men" (R. 104-105, 171-172).

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee, and were never heard from again. No notice of any sort was given by Pickard or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor (R. 106, 172). At the time when Pickard withdrew from the Fort Campbell project, the work required there under his subcontract was from 96% to 98% completed (Id.). Southern completed the work at Fort Campbell and obtained final settlement from the United States Government in April, 1956 (Id.).

Shortly after Pickard left the work at Fort Campbell he also left the Fort Benning project (R 107, 172).

On October 7, 1955, when the supplemental agreement was executed, and at all times thereafter **Pickard owed an unpaid balance in the amount of $34,520 to Atlas Supply Company for materials furnished to Pickard by Atlas at Fort Campbell** (R. 107, 172).

In addition to this amount, Atlas Supply Company was claiming a balance due it from Pickard in the sum of $104,000 on the Fort Benning job (R. 107, 172). **Southern did not dispute the amount of the Atlas Account at Fort Campbell. However, it disputed the Fort Benning Claim of Atlas in its entirety** (R. 107, 172, Test. Baxter, R. 20, 132-133, 135).

In August, 1956, a conference was had between Southern officials and representatives of the Atlas Supply Company. As a result of this conference Southern paid to Atlas Supply Company, in August, 1956, the sum of $35,000 and obtained from Atlas a complete release of its liability under the Miller Act on Pickard's accounts, both at Fort Benning, Georgia, and at Fort Campbell, Tennessee (R. 108, 172-173, Pl. Ex. 22; R. 27-29).

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard

and was carrying them as one consolidated account. Atlas credited the $35,000 payment against this single account, so that **Pickard received full credit for this payment on his indebtedness to Atlas.** Neither Southern nor Atlas at the time of this payment specifically undertook to allocate the $35,000 payment, or any part thereof, to one project or the other (R. 108, 173).

Pickard gave no credit to Southern for this payment on either job, and his books did not reflect the payment (R. 108, 173; Test. Senn, R. 129). There is no evidence that Pickard knew of the payment in August, 1956, but in April, 1957, his attorneys were advised by the attorney for Southern that the payment had been made, and that the same had not been allocated by Southern either to the Fort Benning or the Fort Campbell project (R. 108, 173; Pl. Ex. 32; R. 22-23; Deft. Ex. 6; R. 24-26).

In December, 1956, Pickard filed suit in the District Court for the Middle District of Georgia against Southern and the Continental Casualty Company on **both the Fort Benning contract and the Fort Campbell project** (R. 108, 173; Original Complaint, R. 29-33). Southern filed an answer and counterclaim in which it alleged that it had paid to Pickard sums in excess of the total contract price on each job and sought judgment for such excess. Included in the counterclaim at this time was the $35,000 payment made in August, 1956, to Atlas (R. 109, 173; Answer and Counterclaim, R. 35-36).

In April, 1957, however, Pickard filed the present action in the United States District Court for the Middle District of Tennessee on **the Fort Campbell project only** (R. 109, 173; Complaint, R. 81-84). The Fort Campbell phase of Pickard's claim was subsequently eliminated from the Georgia proceedings and was not litigated in the Georgia case (R. 173; Pre-Trial Statement in Georgia case, R. 40).

According to the Opinion of Judge Bootle (the District Judge in Georgia), this pre-trial statement and the amendment eliminating the Tennessee contract occurred "on the morning of the first day of the trial" in Georgia—March, 1959, just prior to commencement of the actual trial (R. 150).

Pickard's reason for filing the separate suit in Tennessee was that the Miller Act itself requires that every suit brought under its provisions "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ." 40 U. S. C. 270b (b). The question of jurisdiction had not been raised by Southern or Continental Casualty in the Georgia proceedings, and the separation of the two suits was made at Pickard's own instance, because of "jurisdictional" reasons (R. 173. See pre-trial statement in the Georgia case, R. 40).

The Georgia case was tried first, in March, 1959. In the trial of that case Pickard introduced certain sworn exhibits in which he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning and to give credit for the same. He **did not include this $35,000 payment made to Atlas by Southern in August, 1956**, although his counsel had had a copy of the check in their possession long before the time of the Georgia trial (R. 109, 174; Pl. Ex. 32, R. 22-23).

Southern listed on exhibits filed by it in that case the payments made by it to Pickard or on his behalf on the Fort Benning job, for which Southern claimed credit. **The $35,000 payment made to Atlas was not claimed in these exhibits** (Test. Senn, R. 123, 132; Test. Baxter, R. 133,134). The District Judge found as a fact in the present case that the $35,000 payment to Atlas in August, 1956, **was not submitted to or considered by the jury in the trial**

of the Fort Benning case. He further found as a fact that **this item had not been litigated or adjudged by the District Court in Georgia,** and that **credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in the Georgia Court** (R. 109; see also oral statement of District Judge, R. 96). The Court of Appeals for the Sixth Circuit did not disturb these findings (R. 174).

The District Judge stated in his findings of fact that although the $35,000 payment was included in the original counterclaim filed by Southern in the Fort Benning case, it was, prior to the trial in that case, eliminated by Southern from its counterclaim, that it was included by Southern as part of its counterclaim and defense in the present suit, and that Southern claimed credit for $34,520 thereof toward the contract price of the Fort Campbell project (R. 109-110). The **District Judge allowed the credit claimed in the Tennessee case** (R. 116-121), but as previously stated, the Court of Appeals for the Sixth Circuit reversed this holding and held that under Rule 13 (a) of the Federal Rules of Civil Procedure Southern was **compelled** to claim the $35,000 its entirety in the Georgia case (R. 178-182):

> As stated, the Court of Appeals for the Sixth Circuit reached this result in spite of the equities and justice of the case, indicating that it might have reached a different result "if there had been an allocation of the $35,000 payment between the indebtedness to Atlas Supply Company at Fort Benning and the indebtedness at Fort Campbell" (R. 181). The Court entirely overlooked the basic principles of law governing the power of any court to allocate payments between disputed and undisputed accounts, or to allocate payments according to basic principles of equity and justice. See **U. S. for use of Carroll v. Beek**, 151 F. 2d 964 (6 Cir., 1945); **Bain-Nicodemus, Inc., v. Bethay**, 40

Tenn. App. 487, 292 S. W. 2d 232 (1953); 40 Am. Jur., **Payment**, § 129.

The Court of Appeals for the Sixth Circuit reached its decision by a very technical construction of Rule 13 (a). It held that the $35,000 payment was "a potential compulsory counterclaim" in either of the two suits which Pickard had filed, and that its "compulsory status" matured in the suit **"in which and at the time when Southern first filed a responsive pleading"** (R. 181). It entirely overlooked the fact that Pickard himself had made an error of procedure and had embraced the Tennessee contract in the Georgia suit, **so that at the time when Southern first had to file a responsive pleading, both contracts were embraced in the Georgia case.** The holding indicates that the plaintiff may at his discretion delete part of his initial suit, file it elsewhere, and **thereby deprive the defendant of the right to defend the second suit on its facts**, because of the existence of Rule 13 (a). None of the cases cited by the court presented fact situations even closely similar to the present case.

We respectfully submit that Rule 13 (a) was never intended to accomplish an inequitable result such as was reached in the present case, and that the facts of the present case do not fall within Rule 13 (a). **The basic purpose and spirit of Rule 13 (a) was to prevent multiplicity of litigation. The defendants and petitioners in the present case have in no sense violated the purpose of that Rule.** They **have not initiated any suit at any time,** but **have simply sought to defend two separate suits upon the basic facts pertaining to each.**

The item of $35,000 is not in a true sense a "counterclaim" but actually constitutes a payment, and is a matter of defense. Southern undertook, because of the undisputed underlying facts, to allocate $34,520 of the payment

to the Tennessee case, and the District Judge held that it had this right, and that Pickard could not possibly be prejudiced by the proposed allocation, since he received full benefit of the payment and had not himself undertaken to allocate or give credit for it in either of the two suits which he had brought. The holding of the Court of Appeals for the Sixth Circuit compels Southern to undertake to reopen the Georgia case and to claim the entire item in that case, despite the fact that Southern did not recognize any liability to Atlas on the Georgia contract, and disputed Pickard's account with Atlas in Georgia in its entirety, while recognizing the validity of Pickard's indebtedness to Atlas in Tennessee to the extent of $34,520.

SUMMARY OF ARGUMENT.

I.

Petitioners respectfully submit that the decision of the Court of Appeals below misinterprets and misapplies Rule 13 (a) of the Federal Rules of Civil Procedure regarding compulsory counterclaims. The purpose and intent of Rule 13 (a) was to avoid and prevent multiplicity of litigation, and to compel parties to litigation to try in one suit the various claims and differences between them with respect to a particular "transaction or occurrence."

The rule is, of course, designed to prevent the defendant from asserting his offensive claims in a separate forum, and is designed to prevent his instigating new litigation in the same or a different court. It never was designed to apply to, and never contemplated, a situation where a plaintiff had brought two separate suits against a defendant on two separate contracts.

There is no question in the present case but that the sum of $35,000.00 was paid by Southern on Pickard's behalf, on debts which Pickard himself certified to be lawfully due and owing. There further can be no controversy but that Pickard himself made no allocation of the payment in question, did not insist that the payment applied either wholly or in part to the Georgia contract, and stood silent on the trial of the Georgia case when Southern did not claim the payment there.

We earnestly submit that there is nothing whatever in Rule 13 (a) of the Federal Rules of Civil Procedure to prevent a defendant from making a proper application of his payments in framing his defenses to two separate lawsuits growing out of two separate contracts.

II.

The Court of Appeals for the Sixth Circuit did not cite any authority for its holding that Southern was obli-

gated to claim the entire payment in the Georgia case, and prohibited from ever claiming any part of it in the Tennessee case when the Tennessee contract became the subject of a second suit. None of the cases cited by the Court of Appeals presents any fact situation similar to the uncontradicted facts in this record. As far as we have been able to ascertain, this case is one of first impression.

III.

The opinion of the Court of Appeals for the Sixth Circuit ignored a long line of cases from this court and innumerable cases from the nation at large, including cases from Tennessee and from the Sixth Circuit itself, to the effect that when neither a debtor nor a creditor has made an application of a payment, and there exist multiple accounts between the parties, then the court may make application of the payment according to principles of equity and justice. Viewed in the light of this well-settled and incontrovertible principle, we submit that there can be no question but that the District Judge in the present case made a correct application of the payment in question when he permitted credit for the same on the Tennessee contract. There could be no possible prejudice to the plaintiff by this application; and to compel the petitioners to claim the payment in the Georgia case, after the Tennessee contract had been deleted therefrom, would be to compel them to claim it on a contract to which they did not consider it applicable, and to deny them credit for it on a contract where all but a very minor portion of the entire amount was admittedly due and owing.

In the last analysis, the item in question constitutes merely a payment, and is not in a true sense a "counterclaim" at all but an affirmative defense under Rule 8 (a) of the Federal Rules of Civil Procedure.

ARGUMENT.

A. Rule 13 (a) Does Not Govern.

This is a case of first impression. We have found no reported case which deals with the problem here presented. The undisputed facts show that the case does not fall within the literal terms of Rule 13 (a), and that only by a forced, harsh and inequitable construction of Rule 13 (a) has the Court of Appeals for the Sixth Circuit reached its decision. That Court ignored the basic equity and justice of the position of the petitioners; has ignored the basic meaning and purpose of the Federal Rules of Civil Procedure; and has evolved a new concept, that of a **"potential compulsory counterclaim in either of the two suits"**, while at the same time ignoring the fact that under its holding the **defendants were never afforded an opportunity to assert the item in question in the Tennessee suit.**

Actually Rule 13 (a) does not, by its terms, embrace a situation where there are two separate pending actions by the same plaintiff against the same defendants. This is a fact situation which may be unusual, but it is clearly presented in the present case. In order correctly to apply Rule 13 (a) in any situation, the purpose and underlying reason for the rule must be examined; and when this is done, it is clear that Rule 13 (a) was promulgated for the purpose of **preventing multiplicity of litigation** between parties having opposing claims against each other. It never was designed **to prevent a defendant from asserting his defenses** according to the facts underlying them where there are two separate and distinct transactions between the parties which are the subject matter of two separate and distinct suits.

Such was the situation presented here. Southern was first sued in Georgia by Pickard on both contracts. As long as the suit remained thus, there was no reason for

Southern to try to allocate the $35,000 payment between either of the two jobs, since its defenses and counterclaims on both contracts could be asserted in the one suit. **We concede that as long as the case remained in this posture, Southern could not itself have "split off" part of its defenses or counterclaims and filed a separate suit against Pickard in another jurisdiction.** This was the type of procedure disapproved in **United States v. Eastport Steamship Corporation**, 255 F. 2d 795 (2d Cir. 1958). **When, however, Pickard himself deleted part of his claim and brought a separate suit thereon in Tennessee, we submit that basic fairness and justice dictate that the defendant to the second action be permitted to frame his defenses according to the factual basis upon which his payments were made.** Under the undisputed facts in this case, the $35,000 payment made by Southern to Atlas in August, 1956 pertained to a wholly undisputed account of $34,520 arising out of the Fort Campbell contract, and to settlement of a wholly disputed claim of Atlas against Southern and Pickard at Fort Benning. Southern did not concede the Fort Benning account to be valid in the least, and disputed in its entirety the Atlas claim that Pickard was indebted to it at Fort Benning.

Southern, of course, under the Miller Act was secondarily liable to all suppliers of Pickard on either job. The fact that Southern must have been correct in its position that the Fort Benning account was entirely inaccurate is plainly borne out by the fact that Atlas gave Southern a complete release on both jobs for the sum of $35,000. Southern was a bonded and reputable contractor, and there was no possible reason for Atlas so drastically to reduce its claims unless Southern's position were entirely correct. Pickard, of course, was shown by the evidence to be unable to provide a bond, and was an insolvent subcontractor. By settling with Southern, Atlas gave up any practical hope of recovering on its accounts with Pickard,

and in releasing Southern and Continental Casualty, it released the only sources from which it might have any real hope of collection.

We recognize the words "transaction or occurrence" found in Rule 13 (a) are given a broad and liberal interpretation. There can be no quarrel with this, when viewed in the light of the purpose of Rule 13 (a) to prevent multiplicity of litigation. **The decided cases deal with fact situations where a defendant has a potential counterclaim against the plaintiff, and undertakes himself to initiate new litigation against the plaintiff in a different court or in a different suit.** It was this type of procedure which Rule 13 (a) was designed to prevent. The Rule has no application, however, to the situation now presented.

The District Judge, we submit, correctly analyzed the situation when he said that Southern was faced with a situation where the item of $35,000, if it fell within Rule 13 at all, could well have been compulsory in either case **if the two suits had been filed simultaneously and separately.** It certainly pertained, almost in its entirety, to the Tennessee "transaction or occurrence." It pertained, if at all, only very slightly and incidentally to the Georgia "transaction or occurrence." It certainly would be inequitable, unjust and unfair to require the defendant to assert the item in the Georgia case **without ever having a chance to assert it in the Tennessee case.** The District Judge held, of course, that if Southern had undertaken to litigate the item in the Georgia case, it could not do so in Tennessee. Where, however, neither Southern nor Pickard recognized the item in the Georgia case as it finally went to trial and where credit was neither given nor claimed for it there, the District Judge held that the claim could be asserted in the Tennessee case. We submit that this holding was eminently correct, and that the holding of the Court of Appeals to the contrary is

based upon a strained, abstruse and incorrect interpretation of Rule 13 (a).

B. Authorities Cited by the Court Below.

In dealing with the "compulsory counterclaim" feature of this case, the Court of Appeals for the Sixth Circuit cited several cases in support of the proposition that failure to assert a compulsory counterclaim in a prior suit will bar its assertion in a later suit, on the principle of res adjudicata.

Of course, there can be no quarrel with this principle in light of the fact situations dealt with in each of the cases cited by the Court of Appeals. Even a cursory examination of those cases, however, shows that none of them presented a fact situation even remotely similar to the facts of the present case.

The case apparently most relied upon by the Court of Appeals for the Sixth Circuit, and one which was cited at three different places during the course of its opinion, was **United States v. Eastport Steamship Corporation**, 255 F. 2d 795 (2d Cir. 1958). In that case the United States Government had chartered certain vessels to Eastport, and contended that Eastport was indebted to the United States for additional rental in the amount of $31,102.71. In an entirely unrelated transaction Eastport had purchased a vessel from the United States Government and had brought suit to recover a reduction in purchase price because of necessary repairs to the vessel. Eastport had been awarded judgment in that suit for $54,097.16.

Controversy arose between the Government and Eastport as to whether the Government was entitled to offset its claim for charter rent against the judgment in making settlement with Eastport; and in fact the Comptroller General did make the deduction in making a payment to Eastport on its judgment in September, 1954. Imme-

diately thereafter, on October 7, 1954, Eastport brought suit in the United States Court of Claims on the unpaid balance of its judgment. The United States did not plead as a counterclaim or offset the amount of the charter rent, which was the amount remaining unpaid to Eastport on its previous judgment. Instead, the United States, on November 9, 1954, **brought a separate suit on its claim** for charter rent against Eastport in the United States District Court for the Southern District of New York.

A divided Court of Appeals for the Second Circuit held that the United States could not bring its claim against Eastport in the form of a separate action, but that it was obligated under a rule of the Court of Claims, similar to Rule 13 (a) of the Federal Rules of Civil Procedure, to claim its charter rent in the Court of Claims suit brought by Eastport. The Court of Claims had given judgment in favor of Eastport for the full amount remaining unpaid, and the failure of the United States Government to assert its claim for unpaid charter rent in that suit was held to bar its right **to bring a separate suit in a different court** on that claim.

We have no quarrel with the holding of this case, and have always conceded that Southern Construction Company would have had no right itself to begin independent litigation against Pickard on the $35,000 item in question.

In the **Eastport** case, the Court recognized the general rule that in order for a counterclaim to be compulsory under Rule 13 (a), there must be a "logical relationship" between the so-called counterclaim and the original action. It then said:

> "The logical relationship between Eastport's claim for interest and the Government's claim for additional charter hire is obvious. The former could not prevail unless the latter lacked merit." 255 F. 2d at 804.

In other words, there was no question of Eastport's asserting two different claims against the United States Government, and the Government's attempting to allocate payments or credits between the two separate suits. It was simply a question of the Government's violating the obvious purpose of the Rule by undertaking to initiate separate litigation in another forum. The Court of Appeals said:

> "The issues raised by the respective claims were identical. **The failure of the Government to plead its counterclaim could only result in the multiplicity of suits which it is the function of the compulsory counterclaim rule to avoid.**" 255 F. 2d at 805.

Accordingly, we respectfully submit that the case does not support the holding of the Court of Appeals for the Sixth Circuit in the present case.

Three other cases cited by the Sixth Circuit, **Hancock Oil Co. v. Universal Oil Products Company**, 115 F. 2d 45 (9th Cir., 1940); **Pennsylvania R. Co. v. Musante-Phillips, Inc.**, 42 F. Supp. 340 (N. D. Cal. 1941); and **Gallahar v. George A. Rheman Co.**, 50 F. Supp 655 (S. D. Ga. 1943), merely deal with permitting the defendant to file a counterclaim in the original action brought by the plaintiff. In the **Hancock Oil Co.** case the defendant simply sought leave to amend its answer to include a counterclaim, and in the other two cases motions to strike or dismiss counterclaims were involved. None of the cases involved situations where there were two suits between the same parties, and none of them is in any way analogous to the fact situation of the present case.

The Court of Appeals below also cited the leading case of **United Artists Corporation v. Masterpiece Productions, Inc., et al.**, 221 F. 2d 213 (2d Cir. 1955). This case dealt primarily with the question of whether independent jurisdiction must exist regarding defendants to counterclaims,

and on its facts is unrelated to the situation presented in the present case. It follows the well-known rule that a counterclaim is said to arise out of the "transaction or occurrence" that is the subject matter of the plaintiff's action if the counterclaim bears a "logical relationship" to the original action. See also **Moore v. N. Y. Cotton Exchange**, 270 U. S. 593, 70 L. Ed. 750, 46 S. Ct. 367 (1926).

As previously stated, we make no question concerning the correctness of this rule, but we submit that the Court of Appeals for the Sixth Circuit has misapplied it here. Certainly the "logical relationship" test would indicate that the payment here involved belonged in the Tennessee case, rather than in the Georgia case, in view of the uncontradicted facts in the record. It would seem to be carrying the "logical relationship" rule to an illogical extreme when the defendant is required to claim credit for a payment on a contract to which he insists the payment does not appertain, and is denied credit for such payment on another contract where all parties admitted the payment was due and owing.

The only other case cited by the Court of Appeals was **Arvey Corporation v. Peterson**, 178 F. Supp. 132 (E. D. Pa., 1959). This case again turned on a motion to strike a counterclaim filed by a defendant, and did not involve a situation where two separate suits were brought against a defendant.

C. Allocation of Payments.

The Court of Appeals for the Sixth Circuit did not discuss or consider the power of a Court, upon basic principles of equity and justice, to allocate payments which have previously been unallocated by the debtor or creditor. This matter was briefed and argued before the Court, both in the original briefs and on Petition for Rehearing, but apparently was not given any consideration whatever by the Court of Appeals.

This case was very carefully and thoroughly tried by the District Judge. By agreement, questions pertaining to the $55,000 item in question were decided by the Judge rather than the jury (R. 116). During the course of the trial, the District Judge commented from the bench in connection with this matter as follows (R. 128-129):

> "The Court: It is a very important thing. It is an unusual situation the way it was handled. There is no question about that due to this complex relationship between the parties, I suppose, primarily, and the fact that it was immaterial in the beginning to allocate it. That led to the original way of treating it, not allocating it to one or the other.
>
> "This Court is interested in doing what is equitable between the parties and what is just and fair. Of course, if I am bound by a technical rule of law, then I am bound, and there is no way I can get out of it; but if I have any discretion, then I am going to do what I think is equitable and what I think is fair. If, in fact, the people who paid this $55,000 have never gotten any benefit from it whatsoever and have gotten no credit for it, that is going to be a strong consideration in my mind in trying to reach a proper solution of this controversy."

From its very early days, the Supreme Court of the United States has recognized the power of a Court to allocate previously unallocated payments according to fairness and equity. Thus Mr. Justice Story in the case of **The United States v. Kirkpatrick et al.**, 9 Wheat. U. S. 720, 6 L. Ed. 199 (1824) said:

> "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, **the law will apply the payments according to its own notions of justice.**" 9 Wheat. at 737; 6 L. Ed. at 203.

This Court has unhesitatingly followed the foregoing rule in many other cases. See, for example, **National Bank of New York City v. Mechanics' National Bank**, 94 U. S. 437, 24 L. Ed. 126 (1877); **Korbly v. Springfield Institution for Savings**, 245 U. S. 330, 38 S. Ct. 88, 62 L. Ed. 326 (1917).

It would, of course, be obviously inequitable to force a party to have his payments allocated to a disputed account, where there existed another *recognized and undisputed* obligation. See **Standard Surety & Casualty Co. v. U. S., for Use and Benefit of Campbell**, 154 F. 2d 335 (10th Cir. 1946). There the Court of Appeals for the Tenth Circuit said:

> "No designation of payment having been made by either the debtor or the creditor, it was the duty of the court to designate the accounts to which these payments should be applied." 154 F. 2d at 337.

After quoting from the **Kirkpatrick** case, *supra*, and pointing out that the Court rather than the parties had to make an allocation after controversy arose, the Court said:

> "By the same reasoning, **it would be inequitable for a court, when it is called upon to make an application to one of several accounts, to apply it to an account which is in dispute between the parties. That would be aiding one of the parties to the detriment of the other.**" (*Ibid.*)

This principle would seem to be so well settled as to require little further elaboration. For collection of authorities, see 40 Am. Jur., **Payment**, § 129; Annotation 164 A. L. R. 940.

That the foregoing principles are well settled in Tennessee, see **Bain-Nicodemus, Inc. v. Bethay**, 40 Tenn. App. 498, 292 S. W. 2d 234 (1953). Indeed, the Court of Appeals for the Sixth Circuit itself has recognized these principles

and has held that a Court has power to **reallocate** payments between the parties in the interests of equity and fairness. **U. S. for Use of Carroll v. Beck**, 151 F. 2d 964 (6th Cir., 1945).

Tested by these principles, we submit that there can be no question but that the credit sought by Southern in the Tennessee case should be allowed. It admitted owing $34,520 on behalf of Pickard at Fort Campbell, Tennessee. It denied owing anything on his behalf to the Atlas Supply Company at Fort Benning, Georgia. Southern was obviously correct in its contentions, because Atlas accepted $35,000 in full settlement of all of its claims on both jobs.

Further, there can be no possible prejudice to Pickard by the allowing of credit to Southern in the Tennessee case. Knowing that the payment had been made on his behalf, having a copy of the check in his possession, and being under oath, in the trial of the Georgia case he listed all of the payments made by Southern on the Fort Benning job for which he acknowledged that Southern was entitled to credit on the Georgia contract. **He did not list or include the $35,000 payment now in question. Southern likewise did not list or include it in the Georgia trial.** In pretrial motions filed by Southern, the payment had been referred to for purposes of illustrating that the Pickard account with Atlas on the Fort Benning job was in sharp dispute. But in actual litigation of the Georgia contract on its merits, credit for this item was neither sought by Southern nor given by Pickard.

Yet when Southern sought to claim credit for the payment on the Tennessee contract, Pickard took the position that Southern had to claim the credit in the Georgia case or forever lose it. It is not surprising that this position was not appealing to the District Judge, and even when the Court of Appeals for the Sixth Circuit upheld it, it recognized the inequity and harshness thereof.

In the last analysis, of course, the $35,000 item was not, in the true sense, a "counterclaim." It was nothing more than a payment which, under Rule 8 (c) of the Federal Rules of Civil Procedure, is an affirmative defense. Southern waived at the trial any affirmative relief against Pickard, and simply claimed that it had made payments on Pickard's behalf, or to him, in the full amount of the contract price, or in excess thereof. The Trial Judge and the Court of Appeals have both held that Pickard was not entitled to claim rescission of the contract between the parties or to seek any recovery greater than the original contract price, and Pickard has not sought review here of those holdings.

Pickard's contract with Southern was in the amount of $50,000. When Pickard sought to recover this amount in the Tennessee case, Southern sought to show that it had paid for the account of Pickard the sum of $34,520 to one of Pickard's suppliers. Indeed Southern was legally obligated to make such payment under the Miller Act, since Southern was secondarily liable under that act to the suppliers of Pickard. Southern claimed this payment as a credit on the contract price, and clearly the item came within the affirmative defense of payment, where the defendants had a fixed obligation by law under the provisions of the Miller Act here involved.

The fact that the petitioners elected not to claim affirmative relief from Pickard in the trial, and elected rather to treat the payments which they had made as defensive only, does not affect the fundamental nature of the payment made, and should not deprive the defendants of credit therefor. As stated in a recent case, **Desjardins v. Desjardins**, 193 F. Supp. 210, 215 (E. D. Ky. 1961):

> "In determining the credits to which the defendant is entitled, a question in the refinement of pleading arises. Strictly speaking, the defendant's proper

remedy was to plead by way of counterclaim the sum allegedly due the estate of the decedent by reason of any failure of the plaintiff to perform her obligations under the decree. Rule 13, Federal Rules of Civil Procedure, 28 U. S. C. A.

"However, the defendant has elected (as she properly may) to plead the plaintiff's obligations only as matters in defense against the plaintiff's claim. Equity dictates that the court treat the defense as one of recoupment which, while not in the nature of an affirmative claim for judgment and not justifying such a judgment, may be interposed in diminution of a plaintiff's claim in a case such as this. See Restatement, Judgments, pp. 217, 238 (1942); **Bull v. United States**, 1935, 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421; **City of Grand Rapids, Mich. v. McCurdy**, 6 Cir. 1943, 136 F. 2d 615, 619; **United States Plywood Corp. v. Hudson Lumber Co.**, D. C. S. D. N. Y. 1955, 17 F. R. D. 258; **Jefferson, Noyes & Brown v. Western Nat. Bank**, 1911, 144 Ky. 62, 138 S. W. 308."

It would seem that Rule 8 (*c*) of the Federal Rules of Civil Procedure expressly contemplated that one might use payments defensively and seek credit therefor, without seeking an offensive judgment against the original plaintiff. The rule provides:

> **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . payment . . . and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, **the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.**" Fed. Rules Civil Procedure, Rule 8 (*c*).

CONCLUSION.

The very first of the Federal Rules of Civil Procedure promulgated by this Court states that the Rules **"shall be construed to secure the just, speedy and inexpensive determination of every action."** The decision of the Court of Appeals for the Sixth Circuit violates both the spirit and the purpose of the Federal Rules of Civil Procedure, and misapplies a wholesome and desirable Rule concerning counterclaims so as to effect a most unjust, harsh and improper result.

Petitioners earnestly submit that the decision of the Court of Appeals for the Sixth Circuit concerning the compulsory counterclaim feature of this case should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

CHARLES C. TRABUE, JR.,
Nashville 3, Tennessee,
Attorney for Petitioners.

Of Counsel:

TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life & Casualty Tower,
Nashville 3, Tennessee,

HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,

HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.